

DEC 27 2007

Kinney v. Emmis Operation Co.  
No. 05-35661

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

RYMER, Circuit Judge, dissenting:

I part company because temporal proximity in this case says nothing about KOIN's motives; if anything, it cuts *against* an inference that KOIN acted on account of Kinney's disclosure that she had lupus.<sup>1</sup> KOIN knew nothing of Kinney's lupus before her supervisor told Kinney on April 2 of KOIN's plans to jockey positions and move Kinney into the slot of associate producer of the morning show. (That position was to open up when its current occupant moved into the position of producer of the morning show, which, in turn, had become vacant when its occupant resigned.) Her old position was never filled and her old duties were in fact split up. KOIN had no obligation to undo its plans, which were for the legitimate, non-discriminatory purpose of saving money. No other substantial evidence raises a triable issue of fact; KOIN's explanation for lack of documentation and failure to reflect the cost savings on financials is uncontroverted. I would, therefore, affirm.

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<sup>1</sup> This assumes that Kinney established a prima facie case that she was disabled. The district court held otherwise, but I need not reach this issue.